

1995

Berdene D. Hammond v. Don Lee Hammond : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Hammond v. Hammond*, No. 950061 (Utah Court of Appeals, 1995).
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

BERDENE D. HAMMOND,)	
)	
Plaintiff-Appellee,)	
)	Case No. 950061-CA
vs.)	
)	Priority No. 15
DON LEE HAMMOND,)	
)	
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE ANNE M. STIRBA, JUDGE

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FILED

FEB 23 1996

COURT OF APPEALS

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APPLICABLE STATUTORY PROVISIONS

Rule 54(b) of the Utah Rules of Civil Procedure (1994):

When more than one claim for relief is presented in an action . . . and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

REBUTTAL FACTS

1. As an illustration of Ms. Dennison's disregard for the actual facts herein and contrary to her assertion on pg. 2 of her brief, Ms. Dennison knew why the payments from Mr. Hammond had ceased at least one month before she filed her motion on March 26, 1993. (R. 628-629).

2. The essence of the transaction pursuant to which Mr. Hammond loaned \$25,000.00 to Mr. Orr was so that Mr. Orr could exercise an option on land for which he had a buyer. The shares of stock were only additional incentive to Mr. Hammond. (R. 723-724).

3. There is no evidence in the record to support Ms. Dennison's allegation in her brief that it was never agreed, discussed or implied that Mr. Hammond would have the right to encumber the HHEICO contract. Her references in paragraph 6 of her statement of facts do not provide any such support.

4. Contrary to the statements in paragraph 7 of the statement of facts, Mr. Hammond's testimony was that Ms. Dennison did not have an interest in the HHEICO contract. (R. 736).

5. The amount of \$262,951.41 referred to in paragraph 11 of the statement of facts is misleading as it is a gross balance which includes amounts owing on other senior obligations which had to be paid before arriving at the net proceeds. (R. 636-637 and 649-650).

6. Additionally, in said paragraph the Decree of Divorce is mischaracterized. The decree only awarded to Ms. Dennison 65% of the net proceeds. (R. 271-272).

7. Paragraph 12 of the statement of facts mischaracterizes the document at pg. 383 of the record. The document thereat states that \$51,509.37 is the present value of 218 months of payments in the amount of \$505.05. (R. 383).

8. Paragraph 14 of the statement of facts is an assertion of Ms. Dennison's counsel and not a statement contained anywhere in the record.

9. The amount of \$110,100.90 as an amount Ms. Dennison lost relies upon a statement by the trial court which is contrary to the evidence. It assumes, with no factual basis, that there would be 218 future payments of \$505.05.

SUMMARY OF ARGUMENTS

I. Post judgment civil contempt orders are appealable as a matter of right. Furthermore, orders which have been certified pursuant to Rule 54(b) of the Utah Rules of Civil Procedure are appealable as a matter of right.

II. Ms. Dennison relies solely upon paragraph 7, however, paragraph 7 does not in any manner forbid Mr. Hammond

from selling, transferring or otherwise encumbering the HHEICO contract and it does not command Mr. Hammond to obtain the consent of Ms. Dennison before dealing with the HHEICO contract. Mr. Hammond testified that his understanding was that he always has had the right to sell or transfer said contract and that Ms. Dennison never has had any interest in the HHEICO contract at any time.

Ms. Dennison has not presented any evidence to contradict Mr. Hammond's showing of a lack of ability to comply with any court order.

Findings of Fact No. 10 and No. 11 do not provide any support for the trial court's ruling.

III. There is insufficient evidence to support the trial court's order as an award of damages. Said order is a modification of the Decree of Divorce which exceeds the power of the trial court in the proceeding before the court.

IV. Critical evidence regarding the value of the HHEICO contract was missing at the time of Mr. Hammond's motion to dismiss. Ms. Dennison fails to provide any reference to any such evidence and, accordingly, Mr. Hammond's motion to dismiss should have been granted.

V. No evidence of reasonableness was presented at the second hearing for which attorney's fees were awarded. The fee arrangement at the second hearing was an hourly arrangement rather than the flat fee arrangement which existed at the time of the first hearing. Accordingly, there is no evidence to support

the trial court's conclusion of law regarding reasonableness of the amount of fees for the services provided after the first hearing. Since Mr. Hammond is not in contempt, Ms. Dennison should not have been awarded any attorney's fees.

ARGUMENT

I. THE TRIAL COURT'S ORDER ENTERED ON DECEMBER 13, 1994 IS APPEALABLE.

Appellee, Ms. Dennison, relies upon Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988) for its sole authority that the order entered on December 13, 1994 is not appealable. However, Ms. Dennison does not in any manner address the position of the Utah Supreme Court stated therein as follows:

On occasion, we have treated an order of civil contempt as final and appealable. See, e.g., Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981); Thomas v. Thomas, 569 P.2d 1119 (Utah 1977); Snow v. Snow, 13 Utah 15, 43 P. 620 (1896). In Bradshaw, Thomas, and Snow, the contempt orders arose out of supplemental proceedings after a final judgment; therefore, it was unlikely that any subsequent judgment would be entered from which an appeal could be taken.

Id. at 1167 n. 3. All of the quotes in Ms. Dennison's brief refer to prejudgment civil contempt orders. In the instant case the ruling of the trial court entered on December 13, 1994 arose out of Ms. Dennison's post judgment Order to Show Cause. No subsequent judgment will be entered except as to other issues as raised pursuant to the trial court's continuing jurisdiction of a domestic matter.

In Thomas the appeal was from a civil contempt order entered in a domestic matter pursuant to a post judgment order to show cause. The instant case is the same procedural setting.

Accordingly, as in Bradshaw, Thomas and Snow, the ruling of the trial court is appealable as a matter of right.

Additionally, in Von Hake the Utah Supreme Court noted that "an order finding one guilty of criminal contempt is generally considered to be a final order separate from any ongoing proceedings and appealable as a matter of right". Von Hake, 759 P.2d at 1167. On the other hand an order regarding civil contempt during prejudgment civil proceedings is treated the same as any other order entered during the course of civil proceedings. Rule 54(b) of the Utah Rules of Civil Procedure (1994) provides the procedure to appeal said orders as a matter of right and states as follows:

When more than one claim for relief is presented in an action . . . and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

In the instant case such an express determination was made by the trial court that there was no just reason for delay and an express direction that the order entered on December 13, 1994 was a final appealable order. (R. 615-616). Ms. Dennison neglected to inform the Court of this proceeding or to address the effect of said proceeding. On the basis of this proceeding alone, the order entered on December 13, 1994 is appealable as a matter of right.

II. MR. HAMMOND IS NOT IN CONTEMPT OF ANY COURT ORDER.

A. The Decree of Divorce does not impose a duty by its language to not sell, transfer or encumber the HHEICO contract.

U.C.A. §30-3-5(1) and Estate of Manfield, 856 P.2d 1056 (Utah 1993) are irrelevant to the issues before the Court. There is no issue herein regarding the court's power to divide the marital estate upon divorce.

Ms. Dennison's assertions that she became the owner of 65% of the proceeds of the HHEICO contract and that she held a majority interest in the HHEICO contract are wrong and there was no evidence of the value of an award of 65% of the net proceeds. (Brief of Appellee at 12). The trial court acknowledged that Ms. Dennison was not an owner of the HHEICO contract when it prevented her from testifying as to its value based upon an objection that she had no ownership interest therein. (R. 694-695). Ms. Dennison was awarded "65% of the net proceeds of the HHEICO contract". (R. 271). The net proceeds can only be the amount of money which Mr. Hammond had left, of that which he had received pursuant to the HHEICO contract, after he paid certain obligations. Paragraph 7 of the Decree of Divorce created a debt from Mr. Hammond to Ms. Dennison.

Ms. Dennison has not referred the Court to any provision or language of the Decree of Divorce or any other order which requires that Mr. Hammond obtain Ms. Dennison's consent prior to selling, encumbering or otherwise dealing with the HHEICO contract. No such language exists. Ms. Dennison has not referred the Court to any provision or language of the Decree of

Divorce or any other order which forbids Mr. Hammond from selling, encumbering or otherwise dealing with the HHEICO contract. None exists.

The only provision of a court order which Ms. Dennison relies upon is paragraph 7 of the Decree of Divorce. Paragraph 7 states as follows:

The plaintiff is awarded sixty-five percent (65%) of the net proceeds of the HHEICO contract and the defendant is awarded thirty-five percent (35%) of the net proceeds of the HHEICO contract. The current net proceeds from the HHEICO contract are \$777.00 per.(sic) The plaintiff is entitled to receive \$505.05 per month and the defendant is entitled to receive \$271.95 per month from the HHEICO contract. In the event that the net amount received from the HHEICO contract shall differ from the \$777.00 per month, then the parties shall divide the net proceeds sixty-five percent (65%) to the plaintiff and thirty-five percent (35%) to the defendant.

There is no language therein forbidding Mr. Hammond to sell, encumber or otherwise deal with the HHEICO contract, no language awarding an ownership interest to Ms. Dennison and no requirement to obtain her consent. Paragraph 7 of the Decree of Divorce specifically contemplates the situation wherein the net amount received from the HHEICO contract is other than \$777.00 per month, such as the sale or other transfer, and provides that Ms. Dennison shall receive 65% of the net amount received.

Restrictions could easily have been placed upon Mr. Hammond if it had been so intended. Said restrictions must be there explicitly in order to create a known duty, which did not previously exist, to not sell, transfer, assign or encumber said contract.

If there is no command, there is no disobedience. A person may not be held in contempt of court for violating an order, unless the terms of the order are definite, certain and specific.

Goodover v. Lindey's Inc., 847 P.2d 699, 701 (Mont. 1993).

Furthermore, Ms. Dennison does not refer this Court to any evidence at all that Mr. Hammond understood that he was restricted from selling, transferring or encumbering the contract. The only evidence referred to by Ms. Dennison is that Mr. Hammond had knowledge of paragraph 7 of the Decree of Divorce. (Brief of Appellee at 15). There is no evidence or support for Ms. Dennison's allegation in her brief that it was never agreed, discussed or implied that Mr. Hammond would have the right to encumber the HHEICO contract.

Mr. Hammond testified that his understanding was that he always has had the right to sell or transfer said contract. He testified that it was his understanding that Ms. Dennison did not have any interest in the HHEICO contract at any time. (R. 693, 736, 745-746 and 755-756). There is no controverting testimony.

B. Mr. Hammond did not have the ability to comply with the court order and did not willfully and knowingly refuse to comply with the order.

The only evidence that Ms. Dennison sets forth to show that she met her burden of proving, by clear and convincing evidence, that Mr. Hammond had the ability to comply with the court order is some testimony by Mr. Hammond wherein he acknowledges that he could rent an apartment at a cost of \$650.00 per month. Ms. Dennison tries to imply that Mr. Hammond could

have used his portion of the HHEICO proceeds and other money then being spent on a house payment to find other housing and, thus, he had the ability to pay Ms. Dennison. Said implication fails because Ms. Dennison failed to show that the money Mr. Hammond was receiving from the HHEICO contract was not the same money being used to pay his portion of the house payment. No other evidence is presented by Ms. Dennison to support her burden or to rebut the testimony of Mr. Hammond regarding his financial condition and that he did not have the ability to pay Ms. Dennison her portion of the proceeds.

Ms. Dennison relies upon Thomas v. Thomas, 569 P.2d 1119 (Utah 1977) to claim that by she has met her burden by showing that there is a judgment and failure to comply with said judgment. However, Ms. Dennison fails to address the requirements stated immediately following the language which she quotes to the Court which is as follows:

But where there is evidence concerning justification for the failure, the ultimate burden of proving that the party charged is in contempt is on the complainant.

. . .

Under what we regard as a view more enlightened than prevailed in former times, the mere failure to pay a debt or meet an obligation is not punishable by imprisonment.

Id. at 1121. In the instant case evidence was presented concerning justification for the acts of Mr. Hammond which included evidence of unemployment, his financial condition and that he was providing the sole support for the minor children. (R. 646, 648, 653-654, 690-691, 720-721 and 729). Accordingly, the burden remains upon Ms. Dennison to show all three elements

of contempt as set forth in Utah Farm Production Credit Ass'n v. Labrum, 762 P.2d 1070 (Utah 1988) and to meet the burden she must show more than there is a judgment and a failure to comply with said judgment.

C. The findings of the trial court are inadequate to support a holding of contempt.

Ms. Dennison alleges that, in addition to Findings of Fact No. 9 and No. 13, which were discussed in the Brief of Appellant at 18-19, Findings of Fact No. 10 and 11 provide sufficient basis for the trial court's finding of contempt. (Brief of Appellee at 19). Finding of Fact No. 10 in essence states that Mr. Hammond did not confer with Ms. Dennison or obtain her consent. Finding of Fact No. 10 does not provide any support for a conclusion that Mr. Hammond knew of the duty imposed by the court's order, that he had the ability to comply with the order, or that he willfully and knowingly refused to comply.

Finding of Fact No. 11 is an ultimate conclusion of the trial court interpreting paragraph 7 of the Decree of Divorce. It lacks supporting facts, is erroneous on its face, cannot be supported by any evidence and is proven incorrect by the trial court's own statements.

Finding of Fact No. 11 states: "There did not need to be a specific provision in the decree to make clear that he was prevented from encumbering the HHEICO contract." As explained above, that is clear error and contrary to law. Furthermore, it is an admission by the trial court that there is no command in

the Decree of Divorce forbidding Mr. Hammond to sell or otherwise transfer the HHEICO contract.

As set forth in the Brief of Appellant, on several occasions during the proceedings before the trial court the trial court stated that the Decree of Divorce did not restrict Mr. Hammond from selling or transferring the HHEICO contract. The fact that the judge, after reading the Decree of Divorce, so stated is clear, convincing proof that paragraph 7 of the Decree of Divorce does not prevent Mr. Hammond from encumbering the HHEICO contract.

Finally, Ms. Dennison has not presented any evidence regarding the meaning of paragraph 7 of the Decree of Divorce, other than paragraph 7 of the Decree of Divorce. As explained above, Mr. Hammond testified that he did not understand paragraph 7 of the Decree of Divorce to in any way restrict his ability to sell, transfer or encumber the HHEICO contract.

III. THE TRIAL COURT EXCEEDED ITS POWER IN ORDERING
MR. HAMMOND TO REPAY MS. DENNISON AND TO SERVE 30 DAYS
IN JAIL.

This appeal is the proper time and manner to contest the trial court's order after the evidentiary hearing. Mr. Hammond is not required to go through any post judgment proceedings before he can appeal the order.

The only evidence that Ms. Dennison relies upon to justify the court's ruling as an award of damages is the monthly amount set forth in the Decree of Divorce of \$505.05 and an amortization schedule showing that, if all payments are made in

the future at the amount specified in the Decree of Divorce, 218 payments would be made. This totally ignores paragraph 7 of the Decree of Divorce which must be followed in determining what Ms. Dennison is entitled to recover. It also ignores the testimony of Mr. Poulson, the holder of the HHEICO contract, that he didn't know if the payments would continue in the future and that the obligor on the contract had recently changed. (R. 764-765).

There is insufficient evidence for the trial court's award if it is for damages. In essence the trial court's order is a modification of the Decree of Divorce it should be vacated because it exceeds the power of the trial court in the proceedings before the court.

IV. THE TRIAL COURT ERRED IN NOT GRANTING MR. HAMMOND'S MOTION TO DISMISS.

Ms. Dennison incorrectly characterizes the testimony in the trial court and provides no support for her allegations. (Brief of Appellee at 22). Mr. Hammond testified that he sold the HHEICO contract in order to borrow \$25,000 in an attempt to not be required to sell the home where he resided with the parties' minor child. (R. 744). No evidence of present value was presented to the trial court at the time of the Mr. Hammond's motion to dismiss. Furthermore, evidence of present value is not sufficient to establish the fair market value of the contract. No evidence regarding the factors that a willing buyer considers when purchasing such a contract or opinion as to its value was presented.

The other testimony relied upon by Ms. Dennison in her brief - the gross balance of the contract and the number of remaining payments - is insufficient to establish the value of the HHEICO contract. If the value is not established it is not possible to determine whether it has been improperly discounted. Accordingly, the evidence and all reasonable inferences therefrom do not establish that Ms. Dennison convincingly showed a right to relief. Critical evidence was missing and Mr. Hammond's motion to dismiss should have been granted.

V. MRS. DENNISON IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES.

Ms. Dennison inaccurately states that evidence was proffered regarding the reasonableness of the fees awarded to Ms. Dennison. Some evidence of reasonableness was presented at the first hearing. (R. 672). No evidence of reasonableness was presented at the second hearing for which attorney's fees were awarded. (R. 708-709). The fee arrangement at the second hearing was an hourly arrangement rather than the flat fee arrangement which existed at the time of the first hearing. Accordingly, there is no evidence to support the trial court's conclusion of law regarding reasonableness of the amount of fees for the services provided after the first hearing. Ms. Dennison has the burden of proving the reasonableness of said fees. Since there is no evidence in this regard the award should be reversed.

CONCLUSION

In the instant case there was no evidence of a known duty imposed by the court's order; the ability to comply with the

order; and willfully and knowingly refusing to comply with said order. The simple existence of the trial court's ruling on August 11, 1993 demonstrates that the Decree of Divorce does not impose a known duty by its language to not sell, transfer or encumber the HHEICO contract. Finally, the findings of the trial court are inadequate to support its holding of contempt.

It was improper for the trial court to modify the Decree of Divorce and it exceed its power in ordering Mr. Hammond to make payments to Mrs. Dennison and in ordering a judgment in the event of default. Since Mr. Hammond is not in contempt and Mrs. Dennison did not prevail on her order to show cause, she should not have been awarded any attorney's fees.

Respectfully submitted this 23rd day of February, 1996.

DAVID J. HODGSON

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two (2) copies of the foregoing to James B. Hanks, Judge Building, Suite 740, Salt Lake City, UT 84111-2204 this 23rd day of February, 1996.